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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1229

DANIEL THOMAS FALLON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

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(1)

What are the principles which govern Appellate review of sentences by United States Courts of Appeal? This important question of federal law has not but should be decided and clarified by a decision of the Supreme Court of the United States. Courts of Appeals have expressed conflicting opinions on the power to review and the scope of review which govern appeals from sentences: Petitioner urges this court to resolve the conflict between the circuits. This court should exercise its supervisory powers over lower federal courts when the Seventh Circuit Court of Appeals sanctioned the imposition of a five-year maximum sentence, when generally accepted principles of penology suggest that such harshness was unwarranted and when the exercise of First Amendment rights by the petitioner caused the trial judge to abuse his discretion and unconstitutionally discriminate against the petitioner in imposing the sentence. 6

(2)

Does the Selective Service regulatory and legislative scheme of exclusion, exemption, and deferment violate Petitioner's right to equal protection of the laws as guaranteed by the Fifth Amendment, in that it is not reasonably related to the raising of the armed forces on a fair and equitable basis? 11

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Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

Petitioner, Daniel Thomas Fallon, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit entered on March 5, 1969, in the above entitled cause.

CITATION TO THE OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit, printed in Appendix attached hereto, infra, pages 1a-4a, is unreported at the present.

JURISDICTION.

The opinion and judgment of the Court of Appeals were filed and entered on March 5, 1969. This Petition for Writ of Certiorari will be timely filed on or before April 4, 1969.

The Jurisdiction of this court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED.

(1) Whether there is such a flagrant abuse of discretion by a trial judge of the United States District Court, when he sentences a defendant to a maximum five year term because he disagrees with his political philosophy, that there is a violation of due process or this court should invoke its supervisory powers over the lower federal courts?

(2) Whether the Selective Service regulatory and legislative scheme of exclusion, exemption, and deferment violates Petitioner's right to equal protection of the laws as guaranteed by the Fifth Amendment, in that it is not reasonably related to the raising of the armed forces on a fair and equitable basis?

CONSTITUTIONAL PROVISION INVOLVED.

Amendment V to the United States Constitution provides in pertinent part:

"No person shall . . . . be deprived of life, liberty or property, without due process of law; . . .

STATUTES INVOLVED.

50 U.S.C. App. Section 456 (g), and (h), the full texts of which are set forth in the Appendix hereto, pages 11a-14a.

50 U.S.C. App. Section 462 (a) provides in material part:

> "Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title (sections 451-454 and 455-471 of this Appendix), or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000.00, or by such fine and imprisonment . . ."

SELECTIVE SERVICE REGULATIONS INVOLVED.

32 CFR Part 1622: Section 1622.17, Section 1622.20, Section 1622.22, Section 1622.23, Section 1622.24, Section 1622.25, Section 1622.26, Section 1622.30 (a), Section 1622.43, 32 CFR Section 1631.7, the full texts of which are hereafter set forth in the Appendix hereto, pages 15a through 23a.

STATEMENT OF THE CASE.

The case is a prosecution for refusal to submit to induction into the Armed Forces, 50 Appendix U.S.C. section 462. The Petitioner's motion to dismiss the indictment on constitutional grounds was denied prior to trial, and when renewed as a motion for judgment of acquittal, it was denied. At the conclusion of a bench trial, the court found the Petitioner guilty and said, "I think that your acting in behalf of your attitude, your deliberate activity is dangerous, seriously dangerous to our national security. . . ." (Tr. 92-93).* This court then imposed the maximum sentence, five years in prison.

Immediately prior to sentencing the trial court took note of the fact that the Petitioner was a member of CADRE, an organization opposed to conscription which provides young men with information about the draft. The Petitioner had sent literature which this organization distributes to the court. The court reviewed this literature and indicated its disapproval of the opinions expressed in the literature and by the Petitioner. (Tr. 87-90). At the conclusion of the trial, the government offered no evidence in aggravation nor did the government make any recommendation as to a possible sentence. (Tr. 77-81). In fact, the government during the trial produced evidence in mitigation, by proving the Petitioner had no prior criminal record (Gov. Exhibit B-5, Page 11). The Defendant did not try to flee from the Draft. He was willing to accept punishment for the actions he felt morally compelled to take and in fact withdrew his requests for deferments, when he had made up his mind that he could not morally cooperate with Selective Service

* Tr. references are to the Transcript of Proceedings.

any longer (Tr. 17 and 86). The sentence was imposed without a pre-sentence investigation and report.

The Petitioner, a married man whose wife was about to have a baby (Tr. 46) had been a full time student at Central YMCA Junior College (Tr. 68) and was supporting his mother. (Tr. 67, 68). He had also stated that he was conscientiously opposed to participation in war in any form (Gov. Exhibit V-13). On July 21, 1967, the Defendant reported to the Armed Forces examination and entrance station and refused induction. He was indicted, and on January 19, 1968 he was convicted at a bench trial of wilful refusal to submit to induction. An appeal was taken to the United States Court of Appeals in the Seventh Circuit. On March 5, 1969, the United States Court of Appeals for the Seventh Circuit affirmed the decision of the court below. (App. 1a-4a). During the course of the opinion, the court discussed the sentence imposed by the trial court and stated the following:

> "Defendant's attorney informs us that a survey of the records of the District Court for the Northern District of Illinois where defendant was sentenced, shows that in the first eight months of 1968, for violations of the Military Selective Service Act, the sentence received by defendant herein was the most severe, and that none of the other sentences exceeded a term of three years' imprisonment.
>
> In this case, the trial court did not order a presentence investigation and report. However, it seems to be without dispute that defendant did not have a criminal record. He also had withdrawn his claims for deferment.
>
> We would have been better pleased had the sentence imposed on the defendant not exceeded three years, the maximum imposed in other Selective Service cases in the Northern District of Illinois for the eight-month period in 1968." (A. 4a).

However the Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT.

(1)

What are the principles which govern Appellate review of sentences by United States Courts of Appeal? This important question of federal law has not but should be decided and clarified by a decision of the Supreme Court of the United States. Courts of Appeals have expressed conflicting opinions on the power to review and the scope of review which govern appeals from sentences: Petitioner urges this court to resolve the conflict between the circuits. This court should exercise its supervisory powers over lower federal courts when the Seventh Circuit Court of Appeals sanctioned the imposition of a five-year maximum sentence, when generally accepted principles of penology suggest that such harshness was unwarranted and when the exercise of First Amendment rights by the petitioner caused the trial judge to abuse his discretion and unconstitutionally discriminate against the petitioner in imposing the sentence.

"I think that your acting in behalf of your *attitude*, your deliberate activity, is dangerous . . . (emphasis supplied) . . ." the district judge observed shortly before he sentenced the Petitioner. (Tr. 92-93). The attitudes which the Petitioner had expressed were that he believed that the draft was wrong and that the Nation's military policies were immoral. (Tr. 50-75). The Petitioner had publicly expressed these opinions at the trial and prior to it. Yet his action was indistinguishable from that of others who refuse to submit to induction: he peacefully refused to do what he felt was wrong and

did not take a symbolic step to signify his entrance into the Military. The Petitioner and the trial judge disagreed about military conscription and argued with each other. (Tr. 89, 90, 92). The trial judge asserted that the national defense is an "absolute necessity to our existence." (Tr. 92) while the Petitioner said, "I just cannot see how one man can say, 'I love you and I love you so much that I am going to kill you, in order to protect all of us.'" (Tr. 63). The political disagreement between the Petitioner and the trial judge was an improper basis for imposing the maximum sentence of imprisonment: five years. (50 App. USC, Sect. 462). In expressing opinions about the draft and military policy, the Petitioner was exercising rights protected by the First Amendment to the Constitution of the United States. We respectfully suggest that a sentence which is harsher than usual because the defendant expressed unpopular opinions about the draft violates due process as much as a statute which uses race as a basis for treating criminal defendants differently. Cf *McLaughlin* v. *Florida*, 379 U.S. 184 (1964). Cf *Thomas* v. *United States*, 368 F. 2d 941 (5th Cir. 1966) (Violation of right against self incrimination at sentencing was grounds for vacating sentence under 28 USC Sect. 2255).

The trial judge's disagreement with the Petitioner's political beliefs rather than an evaluation of the penal purposes to be served by the punishment provoked the five-year maximum sentence. The record does not support the notion that the long sentence was needed to protect the public, for the Petitioner had no prior criminal record (Gov't Exhibit B-5, R-11) and presented no physical threat to any person. Harsh punishment was not required to express community outrage at some evil con-

duct: The Petitioner honestly attempted to face the draft and came to court to express those things about the draft which he believed to be unfair and immoral. Lengthy imprisonment was unnecessary to accomplish Petitioner's general reform and rehabilitation. His moral character is of the highest, and we doubt that he will believe that the draft is fairer because he spends a long time in jail. General deterrence could be accomplished by the imposition of a sentence which was similar to the other sentences imposed in the Northern District of Illinois during the first eight months of 1968. The Government did not offer any information in aggravation, which distinguished the Petitioner from other Selective Service violators (Tr. 78-81), nor did the Prosecutor make a recommendation on sentencing. (Tr. 93, 78-81). The trial court did not order a pre-sentence investigation. (Tr. 93).

A striking disparity between the sentence imposed upon the Petitioner and the sentences imposed on other Selective Service violators appears from the records of the United States District Court for the Northern District of Illinois. The Court of Appeals observed that in the first eight months of 1968, for such violations, the sentence received by the Petitioner was the most severe, and that none of the other sentences exceeded a term of three years imprisonment. (App. 4a). Nothing in the record distinguishes the Petitioner from those who received lighter sentences. In *Skinner* v. *Oklahoma, ex rel Williamson,* 316 U.S. 535, 541 (1941) the court observed, "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." 316 U.S. at 541.

We respectfully suggest that imposing a sentence which was two years longer than any other Selective Service sentence in Petitioner's community, was without basis and deprived the Petitioner of due process.

Some judges have assumed that no Appellate review of sentences exists in Federal courts, 40 FRD 79. Yet from time to time the Supreme Court of the United States and the Federal Courts of Appeal have exercised their supervisory power over lower Federal courts to pass upon sentences. In *United States* v. *Dougherty,* 269 U.S. 360 (1925), the court observed that a sentence of fifteen years for three sales of narcotics "seems extremely harsh." 269 U.S. at 364, and remanded the case to the district court for reconsideration of the sentence. In *Yates* v. *United States,* 356 U.S. 363 (1958) the court held that a lighter sentence should be imposed by the district court when the Petitioner was guilty of only one contempt, not eleven.

The Courts of Appeal have conflicting opinions on the power of Courts of Appeal to review sentences and the standards to be used when sentences are imposed. The Courts of Appeals for the District of Columbia Circuit and the Sixth Circuit have reviewed sentences, while the Court of Appeals for the Fifth and Eighth Circuits have refused to review sentences which did not exceed the maximum permitted by statute. Compare *Leach* v. *United States,* 334 F. 2d 945 (D.C. Cir. 1964), *Wilson* v. *United States,* 335 F. 2d 982, 984-985 (D.C. Cir. 1963), *United States* v. *Moody,* 371 F. 2d 688, 693 (6th Cir. 1967) with *Sumrall* v. *United States,* 397 F. 2d 924, 927 (5th Cir. 1968) and *Heath* v. *United States,* 375 F. 2d 521, 523 (8th Cir. 1967).

Recently the Ninth Circuit adopted an ambiguous position on the Court of Appeals' power to review sentences. In *Westover* v. *United States,* 394 F. 2d 164, 167 (9th Cir. 1968) the Court remanded for a new hearing on a motion to suppress, and observed, "It is not *yet* a part of our function to review sentences. . . ." (emphasis supplied) Whether the court meant that the sentencing issue was not ripe for review because of the remand or meant that the court lacked the power to review sentences under the present state of the law is unclear. Even though the court disclaimed the power to then review a sentence, the court went on to say, "But the Jury found Westover guilty of two very serious offenses. These were not his first, so heavy sentences were justified if the case is affirmed." 394 F. 2d at 167.

In *United States* v. *Wiley,* 278 F. 2d 500 (7th Cir. 1960), the Court of Appeals set aside a three year sentence imposed upon a minor defendant with no prior criminal record where a co-defendant with four prior felony convictions received a sentence of only two years. However, in the Petitioner's case, the disparity between Petitioner's five year sentence and other sentences in Selective Service cases did not prompt the Court of Appeals to act.

A survey of the cases cited above demonstrates that the Federal Courts of Appeal have not articulated precedents which clarify standards to be used when sentences are imposed, and do not agree on what makes a sentence reviewable by an Appellate tribunal.

Clearer precedents governing the Appellate review of sentences would provide the Federal courts with a means of controlling gross disparity in sentences, and would per-

mit the reviewing courts to see that community policies of punishment, protection of the public, reform of the offender and deterrence were regularly applied. (e.g. *Regina* v. *Shaw,* (British Columbia Court of Appeals 1968) 66 W.W.R. 626; *King* v. *McDonald,* (Supreme Court of Nova Scotia 1951) 26 M.P.R. 218; *Regina* v. *Jones,* (Ontario Court of Appeal 1956) 115 C.C.C. 274, 276. Dissent agreeing in principle but taking a different view of the Record; *People* v. *Evrard,* 55 Ill. App. 270, 274-277, 204 N.E. 2d 777, 779-780 (1965). See 55 Ill. B.J. 300 Halperin, Appellate Review of sentence in Illinois (1966).)

Petitioner urges this Court to grant Certiorari to resolve the conflict in the circuits and to invoke its supervisory power over Federal Courts.

(2)

The Court of Appeals for the Seventh Circuit has decided in this case an important question of Federal Constitutional law which has not been, but should be, settled by this Court, namely: Does the Selective Service regulatory and legislative scheme of exclusion, exemption, and deferment violate the Petitioner's right to equal protection of the laws as guaranteed by the Fifth Amendment, in that it is not reasonably related to the raising of the armed forces on a fair and equitable basis?

First of all, it is Petitioner's contention that the exclusion of women from the terms of the Selective Service Act constitutes an unjustifiable discrimination. The Selective Service Act requires the registration of men only, thereby exempting women from its provisions and obligations, 50 U.S.C. App. Sect. 453. That this Nation believes in the equality of men and women before the law

seems too evident a proposition to require documentation. Women as well as men have the right to vote, to hold public office, share the duty to pay taxes, etc. Women as well as men benefit from the protection afforded this Nation by its Armed Forces. Yet, anomalously, only men are required to serve in the Armed Forces. Women are free from this obligation of citizenship. That women are capable of service in the Armed Forces is clear, as there are women's corps in the various branches of the Armed Forces. Yet men are forced to serve, while women are not!

What makes this situation even more ironic is that Congress in June, 1967, amended 50 U.S.C. App. Sect. 460(b) (3) to read "No citizen shall be denied membership on any local board or appeal board on account of sex." So now we have a law that specifically allows women to be draftors and yet grants them immunity from being being draftees. It seems only fair that if women as well as men can sit on draft boards, then women as well as men should be subject to the draft. Otherwise, what is the meaning of "Equality under the Law"?

This court in the past has reviewed cases involving statutory discriminations concerning women. See *Hoyt* v. *Florida,* probable jurisdiction noted. 364 U.S. 930, decision 368 U.S. 57 (1961), and *Goessaert* v. *Cleary,* probable jurisdiction noted 68 S. Ct. 1340, decision 335 U.S. 464 (1948). Because of the nature of the draft and its widespread impact, its statutory discrimination in favor of women raises even more significant questions than were raised in the above two cases.

This Court stated in *Bolling* v. *Sharpe,* 347 U.S. 497, 499 (1954) that "Classifications based solely upon race

must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."

Petitioner contends that this statement is directly applicable to classifications based solely on sex.

The Petitioner also contends that the exclusion of women from the Military Selective Service Act of 1967 and certain classifications thereunder are not reasonably related to the purposes of the Act, and thus violate the requirements of Fifth Amendment due process, *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954), and *Morey* v. *Doud*, 354 U.S. 457, 465 (1957). The Court of Appeals for the Seventh Circuit found the exclusion of women and the classifications in question to be reasonably related to the purposes of the act, though no reasons were given for so finding. (App. 3a). Thus, there is no dispute as to the standard of law to be applied in determining the constitutionality of the Act. It is solely a question of whether this exclusion and certain classifications are "based on differences that are reasonably related to the purposes of the act in which [they] are found." *Morey* v. *Doud*, 354 U.S. 457, 465 (1957).

The purpose of the Military Selective Service Act of 1967 is set out in 50 U.S.C. App., Sec. 451, wherein it is stated that:

> (b) The Congress declares that an adequate armed strength must be achieved and maintained to insure the security of the Nation.
>
> (c) The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be *shared generally, in accordance with a system of selection which is fair and just,*

and which is consistent with the maintenance of an effective national economy. (emphasis added)

It is Petitioner's contention that the obligation of serving in the Armed Forces is not shared generally, and that the system of selection employed is anything but fair and just. On the contrary, it is very unfair, and operates in an invidiously discriminatory manner. Further, the system of selection is not necessarily related to the maintenance of an effective national economy for purposes of defense.

Section 453 of the Act and its predecessors[1] requires the registration of all male persons in the United States upon their reaching their eighteenth birthdays. Pursuant to this provision, 37,145,248 males, (App. 8a), were so registered as of January 31, 1969. The Act and regulations issued pursuant to it provide for the classification of registrants into various categories depending on such circumstances as age, physical health, marital and fatherhood status, occupation, etc., 50 U.S.C. App. Sec. 451 et. seq. and 32 C.F.R. 1622 et. seq. (See App. 8a for a breakdown of the number of men in each classification as of January 31, 1969, and App. 6a et. seq. for a definition of each classification.)

As is evident from the classification table, App. 8a, approximately forty-five percent of those registered are over the age of liability.[2] Of those registrants who are still liable for military service, some 20,496,640[3], less

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[1] Universal Military Training and Service Act of 1948, 62 Stat. 605 and the Universal Military Training and Service Act of 1951, 65 Stat. 76.

[2] Over 26 for those never deferred; over 35 for those with "extended liability", i.e. who have ever held any deferment. See 32 C.F.R. 1622.50.

[3] All figures hereinafter, as of January 31, 1969, A. 8a-9a, unless otherwise noted.

than one-third, some 6,827,436[4], are in classifications directly related to service in the Armed Forces or a reserve branch thereof.

Of the remaining 13,669,204 registrants still liable under the Act, 2,327,699 are classified IV-F (not qualified for military service) by virtue of a serious physical, mental, or moral deficiency or defect, 50 U.S.C. App. Sec. 456 (h) (2) and 32 CFR 1622.44. And 1,329,521 are classified I-A or I-A-O.[5] Many of these men will eventually serve in the Armed Forces, but great numbers of them will not.[6] Finally, there are 503,711 registrants distributed among the following classifications, I-O, I-W, I-S, IV-B, and IV-C. These classifications are not at issue in this case.

There remain 9,508,273 men who are classified as follows:

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[4] This figure is arrived at by adding the number of registrants in the following classifications:

I-C	(Inducted into Armed Forces)	478,805
I-C	(Enlisted in Armed Forces)	2,441,468
I-D	(Reservists, ROTC, etc.)	942,165
IV-A	(Completed Service, or Sole Surviving Son)	2,964,998
	TOTAL	6,827,436

cf. A. 8a-9a

[5] This figure does not include 123,792 who are classified I-A or I-A-O, but who are 26 years or older with liability extended, A. 8a. They will be spoken of later.

[6] Hundreds of thousands of I-A's will be reclassified into deferred categories, A. 8a. In September, 1968 alone, 45% of the I-A's examined at pre-induction physicals were rejected, and 20.7% were rejected at time of induction. *Manpower Comments*, Jan. 1969, p. 17.

I-A	(26 years and older with liability extended)	123,792
I-Y	(Qualified in time of war or national emergency)	2,865,660
II-A	(Occupational deferment except agricultural)	401,249
II-A	(Apprentice)	49,361
II-C	(Agricultural Deferment)	22,526
II-S	(Student Deferment)	1,806,792
III-A	(Dependency Deferment)	4,131,318
IV-D	(Ministers, Divinity Students)	107,575
		9,508,273

The men in these classifications number almost half of the registrants still liable for military service. And it is this series of classifications that Petitioner contends are based on differences not reasonably related to the purposes of the Selective Service Act.

(a) Class III-A. There are over four million men classified III-A (extreme hardship deferment or registrant with child or children), 50 U.S.C. App. Sec. 456 (h) and 32 CFR 1622.30. The overwhelming majority of these are registrants with one or more children. There are more men in this classification than there are in our entire Armed Forces, App. 10a. And the number of men classified III-A exceeds the total of men classified I-C (inducted or enlisted in Armed Forces) or I-D (member of Reserves, ROTC, etc.), App. 8a.

As long as a father lives with his children at home[7], he has a permanent deferment. This fact raises a key

[7] 50 U.S.C. App. Sec. 456 (h) (2) requires that registrants who have children or wives and children must maintain a bona fide family relationship with them in their homes in order to obtain a deferment.

question. Is it fair and equitable to exempt fathers from military service, when non-fathers are not so exempt? It would seem not. It is obvious that becoming a father in no way affects one's ability to perform military service. Furthermore, neither our national security nor economy is strengthened by such a permanent deferment. In short, the permanent deferment of fathers as opposed to non-fathers appears to have no rational basis in light of the purposes of the Military Selective Service Act.

(b) Class I-Y. There are 2,865,660 men classified I-Y (Qualified for military service only in time of war or national emergency). 50 U.S.C. App. Sec. 456 (h) (2) and 32 C.F.R. 1622.17. That is almost as many men as are classified I-C (inducted or enlisted in Armed Forces). Though not qualified for service under present physical, mental, or moral standards. These men are qualified for service when the Nation needs them most, namely, in time of war or national emergency declared by Congress.

Though bothered by some minor physical, mental or moral defect these men are capable of performing many useful function within the military. However, they, too, possess what amounts to a permanent deferment. Even during the hottest periods of the Vietnam War they were not called for induction.[8] It really isn't fair to permanently defer men with some minor physical or psychological ailment who could perform many useful functions

[8] The reason that over five million men are classified IV-F of I-Y is that the Armed Forces currently require almost all inductees to meet the qualifications of combat soldiers, even though only a small minority will actually see combat. Because of the vast manpower pool available, the Armed Forces can afford to reject men who are quite capable of performing many useful functions within the military. See Dept. of Defense regulations, C 1, AR 40-501, 1-2, and C 22, AR 40-501, 2-1 et. seq.

within the military, and at the same time to draft those not so blessed with minor ailments. Here, too, is a classification which bears no relation to service in the Armed Forces or a fair and equitable basis. Certainly this deferment has no relationship to the maintenance of our effective national economy.

(c) Class IV-D. There are 107,575 men classified IV-D (Ministers of religion, theology students, etc.). They are exempt from training and service under the Act, but not from registration, 50 U.S.C. App. Sec. 450 (g). They are as capable of military service as other registrants, yet they are exempt from it. It is impossible to see how this exemption is in any way based on differences reasonably related to the purposes of the Act. This exemption would appear to be a clear establishment of religion in violation of the First Amendment prohibition thereof. It certainly bears no relation to the armed strength and security of the Nation.

(d) Class I-A, 26 years or older with liability extended. 123,792 men are so classified. Though liable for military service, these men possess what amounts to a permanent deferment, even though they are not in a deferred classification. This is so because of their low place on the order of call, see 32 C.F.R. 1631.7 (a)(5). Men in this category also were not called for induction during the Vietnam war. As is evidenced by their I-A classification, they are qualified for military service, yet because of their age they are not called. The arbitrary age of 26 hardly seems to be a difference reasonably related to the purposes of the Act.

(e) Class II-S (student deferment). 1,806,792 men are in this classification. This deferment is given to a

registrant who is pursuing a full-time course of instruction at a college or university until he receives his baccalaureate degree, or attains his 24th birthday, whichever occurs first, 50 U.S.C. App. 456 (h) (1). This deferment arbitrarily favors registrants who are intelligent enough and financially able to go to college, as opposed to those who are not so blessed. Though liable to the draft after they have finished college, students are given at least a four year reprieve from military service.[9] In addition, their college education enables them to develop skills whereby they can qualify for occupational deferments (II-A's) upon graduation.

Since almost all 401,249 II-A's are college graduates, it is evident that a very substantial number of college graduates exchange their II-S deferments for II-A deferments upon receiving their degrees. By keeping their II-A deferments for a few years until they reach 26 they manage to parlay their temporary II-S deferments into a "de facto" exemption from the draft. Obviously this is an invidious discrimination between college trained and non-college trained registrants. Once again we have a classification there is in no way related to having military service distributed on a fair and equitable basis.

(f) II-A (occupational deferment) 450,610 men are in this classification (49,361 are apprentices).[10] A registrant can obtain a II-A if his local board determines that his occupation is "necessary to the maintenance of the national health, safety or interest." 50 U.S.C. App. 456 (h)(2), also 32 CFR 1622.22, .23. The Selective Serv-

[9] A deferment of this length enables students to avoid military service during so-called "hot" periods, such as the Vietnam War.

[10] There are also an additional 22,526 registrants who are classified II-C (occupational deferment in agriculture). See 32 C.F.R. 1622.24. What is said here applies to them also.

ice Act sets no standards as to what occupations qualify registrants for II-A classifications. This is left solely to the discretion of local boards. Often service in the Peace Corps or VISTA qualifies for a II-A,[11] but working in a defense industry, the OEO poverty program, or teaching in a ghetto school may suffice also.

If this deferment was restricted to occupations in defense or defense related industries, then it would be consistent with the purposes of the act. However, the standard set forth in the Act, namely, ". . . in the national health, safety, or interest," is so broad that it covers many occupations completely unrelated to national defense. Such a broad deferment is not related to the purposes of the act, because the basic purpose of the act is to provide simultaneously manpower for the Armed Forces and maintain an effective national economy for *purposes of defense.* Such occupations as teaching, VISTA, and the Peace Corps, though important, do not come within the scope of these purposes.

This power to grant occupational deferments enables the Selective Service System to channel young men into occupations *it* deems vital to the national health, safety or interest. Selective Service is thus empowered to see to it that industries or callings it finds essential are well supplied with "semi-conscripted" manpower, whereas other industries and callings are not so favored.

Selective Service itself has recognized this role it plays in civilian life. A memorandum from National Selective Service entitled *Channeling* (July, 1965) stated:

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[11] *Why the Draft,* James C. Miller III, Penguin Books, Inc. (1968) p. 27.

> While the best known purpose of Selective Service is to procure manpower for the armed forces, a variety of related processes take place outside delivery of manpower to the active armed forces. Many of these may be put under the heading of "channeling manpower." Many young men would not have pursued a higher education if there had not been a program of student deferment. Many young scientists, engineers, tool and die makers, and other possessers of scarce skills would not remain in their jobs in the defense effort if it were not for a program of occupational deferments. . . .
>
> This brings with it the ever increasing problem of how to control effectively the service of individuals who are not in the armed forces. . . .
>
> *The psychology of granting wide choice under pressure to take action is the American or indirect way of achieving what is done by direction in foreign countries where choice is not permitted.* . . . (emphasis added)
>
> Delivery of manpower for induction, the process of providing a few thousand men with transportation to a reception center, is not much of an administrative or financial challenge. It is in dealing with the other millions of registrants that the System is heavily occupied, developing more effective human beings in the national interest.

Petitioner submits that the "channeling" of registrants into occupations that Selective Service deems "in the national interest" in exchange for draft deferments is constitutionally improper. After all, it is the *Military* Selective Service Act that Selective Service is to implement, not the *Civilian* Selective Service Act. Selective Service's function is to get men into military service on a fair and equitable basis, not to keep them out to

man certain industries and occupations it deems good for the community.

At the heart of the constitutional question posed by petitioner is the population explosion. For the simple facts of the matter are that of the millions of men eligible for military service, the military can use only a comparatively small number. Approximately one-half to two-thirds of the men eligible do not now serve. See Marshall Report, p. 15.[12] As that report stated in its introduction on page three.

> A dramatic population growth has increased the supply of eligible men available for military service. But changes in military technology and transitions in strategic concepts have at the same time modified manpower requirements for the national security. Of the nearly two million men now reaching draft age each year, our Armed Forces are likely to need only from one-half to one-third of them, varying with the circumstances. And of those, only a portion must be selected for non-voluntary induction. (The range in recent years has been from ten to forty percent, depending on the total size of the force level.)

What is undeniable is that the large majority of men do not serve in the military while they are between the ages of eighteen and thirty-five. And of the minority of the men who do serve, the great majority of them do so voluntarily. Thus, of the millions of men eligible for conscription each year, only a few hundred thousand are actually conscripted. (See App. 10a). This is so now and will continue to be so in the future simply be-

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[12] *Report of National Advisory Commission on Selective Service*, commonly known as the *Marshall Report*, p. 15, U. S. Government Printing Office (1967).

cause the military does not know what to do with all the men eligible for military service.

The question posed by the Marshall Commission was: "Who serves when not all serve?" (Marshall Report, p. 3) The answer of Congress and Selective Service to this basic question violates petitioner's right to equal protection of the laws as guaranteed by the Fifth Amendment.

Accordingly, Petitioner respectfully submits that this Court should issue its Writ of Certiorari in order that it may decide this important question of Federal Constitutional Law.

CONCLUSION.

For the reasons severally and collectively assigned here it is respectfully prayed that this Court issue its Writ of Certiorari to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Attorneys for Petitioner

In the
United States Court of Appeals
For the Seventh Circuit

No. 16828 September Term 1968 — January Session 1969

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DANIEL THOMAS FALLON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

March 5, 1969

Before DUFFY, *Senior Circuit Judge,* SWYGERT and KERNER, *Circuit Judges.*

DUFFY, *Senior Circuit Judge.* This suit challenges the constitutionality of the Military Selective Service Act of 1967, 50 U.S.C. APP. § 451 et seq. Defendant was convicted because of his refusal to be inducted under the Act into the armed services of this country.

It may be advisable to first consider some fundamentals. The United States Constitution, Article I, Section 8, specifically grants to Congress the power to raise and support armies and navies. In enacting the Military Service Act of 1967, Congress declared "The Congress declares that an adequate armed strength must be achieved and maintained to insure the security of this Nation." The several provisions of the Act to which the defendant herein takes exception were certainly enacted with that purpose in view.

The duty of a citizen of this nation was well expressed a number of years ago by the United States Supreme Court. In *Jacobson* v. *Massachusetts,* 197 U.S. 11, 29, that Court said: "The liberty secured by the Fourteenth Amendment, this Court has said, consists, in part, in the right of a person 'to live and work where he will,' *Allgeyer* v. *Louisiana,* 165 U.S. 578; and yet he may be com-

pelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense."

Also appropriate is the statement of Chief Justice White speaking for the Court in *Selective Draft Law Cases,* 245 U.S. 366, 378: "It may not be doubted that the very conception of a just government and its duty to the citizens includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it."

Defendant first argues that the classification and deferment provisions under the Military Selective Service Act violates equal protection of the law and thereby violates the due process clause of the Fifth Amendment of the United States Constitution.

In support of his first contention, defendant points to the fact that the Selective Service Act requires the registration of males only. Defendant says: "This fact alone brands it as a piece of invidiously discriminatory legislation." Defendant argues: "Women are just as capable as men at performing a wide range of useful jobs in the military, from punching typewriters to pulling triggers." Defendant also argues: "It seems only fair that if women as well as men can sit on draft boards, then women as well as men should be subject to the draft."

With reference to the classification of ministers and divinity students (IV-D), defendant asks "Aren't they as capable of pulling triggers as other men?" Defendant also objects to the classification of fathers (III-A) and students (II-S). Defendant also protests the "magic age of 26." Defendant insists that all such classifications are in violation of the due process clause of the Fifth Amendment.

Congress did grant various exemptions from military service such as conscientious objectors and ministers of religion, but such exemptions were matters of legislative grace. *United States* v. *Mohammed,* 7 Cir., 1961, 288 F.2d 236, 242; *Parrott* v. *United States,* 9 Cir., 1966, 370 F.2d 388, 391.

Defendant repeats over and over again that he is not arguing the various classifications and deferments as

unreasonable in themselves, but that such classifications are not reasonably related to the purpose of the Act. We disagree. We hold such classifications and deferments are reasonably related to the purposes of the Selective Service Act. Congress was entitled to consider factors which would both maximize the efficiency and minimize the expense of raising an army and minimize the disruption of what were considered important civilian functions. We hold further that such classifications and deferments in the Military Service Act are not in violation of the due process clause of the Fifth Amendment to the Federal Constitution.

There are, of course, some inequities in the administration of the Selective Service Act. Possibly some better system can be devised. But any such change is for the consideration and determination of Congress.

The second contention of defendant is that military conscription, absent a declared war, constitutes involuntary servitude in violation of the Thirteenth Amendment of the United States Constitution. Defendant seems to concede that we decided this question to the contrary in *United States* v. *Holmes,* 7 Cir., 1967, 387 F.2d 781.

In *United States* v. *Holmes, supra,* page 784, we held that compulsory civilian labor is merely the alternative to compulsory military service, and that compulsory civilian labor does not violate the prohibition of the involuntary servitude clause in the Thirteenth Amendment. Defendant invites us to change our declaration in this respect. We decline the invitation.

In *Holmes,* this Court reiterated the constitutional guide lines as to legislative classifications by stating: "The equal protection clause as provided in the Fourteenth Amendment, or implied in the due process clause of the Fifth Amendment, *Bolling* v. *Sharp,* 347 U.S. 497, 499 (1954), requires only that all legislative classifications have a reasonable basis and that everyone placed within a classification be treated similarly." *United States* v. *Holmes,* 7 Cir., 1967 [rehear. den. 1968], 387 F.2d 781, 785, cert. den. 391 U.S. 936.

The view of the defendant as to the alleged violation of the Thirteenth Amendment seems to be explained in the following quotation from his brief: "Since there is no provision in the Thirteenth Amendment allowing the

Government to force people into involuntary servitude when it deems it necessary for military purposes, it logically and necessarily follows that the Thirteenth Amendment prohibits that form of involuntary servitude." We reject this argument. It is not founded on either logic or good sense.

We hold the induction of defendant Fallon did not constitute involuntary servitude in violation of the Thirteenth Amendment of the United States Constitution.

The third point raised by defendant is that the sentence imposed by the District Judge was unduly harsh. The five-year term was the highest sentence of imprisonment that could have been imposed although a fine of up to $10,000 could have been levied in addition to the term of imprisonment.

Defendant's attorney informs us that a survey of the records of the District Court for the Northern District of Illinois where defendant was sentenced, shows that in the first eight months of 1968, for violations of the Military Selective Service Act, the sentence received by defendant herein was the most severe, and that none of the other sentences exceeded a term of three years' imprisonment.

In this case, the trial court did not order a presentence investigation and report. However, it seems to be without dispute that defendant did not have a criminal record. He also had withdrawn his claims for deferment.

We would have been better pleased had the sentence imposed on the defendant not exceeded three years, the maximum imposed in other Selective Service cases in the Northern District of Illinois for the eight-month period in 1968. However, the sentence which was imposed was within the legislative maximum. We cannot say that the District Court abused its discretion. We affirm the judgment. *Westover* v. *United States*, 9 Cir., 394 F.2d 164; *Heath* v. *United States*, 8 Cir., 375 F.2d 521, 523.

The judgment of the District Court is

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

OPINION BY JUDGE DUFFY

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

Wednesday, March 5, 1969

Before

Hon. F. Ryan Duffy, Senior Circuit Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. Otto Kerner, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* No. 16828 vs. DANIEL THOMAS FALLON, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this day.

Selective Service Classifications

Class I

Class I-A: Registrant available for military service.

Class I-A-O: Conscientious objector registrant available for non-combatant military service only.

Class I-C: Member of the Armed Forces of the United States, the Coast and Geodetic Survey, or the Public Health Service.

Class I-D: Qualified member of reserve component, or student taking military training, including ROTC and accepted aviation cadet applicant.

Class I-O: Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.

Class I-S: Student deferred by law until graduation from high school or attainment of age of 20, or until end of his academic year at a college or university.

Class I-W: Conscientious objector performing civilian work contributing to the maintenance of the national health, safety, or interest, or who has completed such work.

Class I-Y: Registrant qualified for military service only in time of war or national emergency.

Class II

Class II-A: Occupational deferment (other than agricultural and student).

Class II-C: Agricultural deferment.

Class II-S: Student deferment.

CLASS III

Class III-A: Extreme hardship deferment, or registrant with a child or children.

CLASS IV

Class IV-A: Registrant with sufficient prior active service or who is a sole surviving son.

Class IV-B: Official deferred by law.

Class IV-C: Alien not currently liable for military service.

Class IV-D: Minister of religion or divinity student.

Class IV-F: Registrant not qualified for any military service.

CLASS V

Class V-A: Registrant over the age of liability for military service.

Classification Picture as of January 31, 1969

Class	*Number*
Total	37,145,248
I-A and I-A-O	1,453,313
Single or married after August 26, 1965	
Examined and qualified	124,200
Not examined	362,903
Induction or examination postponed	11,607
Ordered for induction or examination	193,152
Pending reclassification	129,643
Personal appearance and appeals in process	58,460
Delinquents	23,025
Married on or before August 26, 1965	
Examined and qualified	12,661
Not examined	5,114
Induction or examination postponed	101
Ordered for induction or examination	399
Pending reclassification	1,261
Personal appearance and appeals in process	410
Delinquents	255
26 years and older with liability extended	123,792
Under 19 years of age	406,330
I-Y Qualified only in an emergency	2,865,660
I-C (Inducted)	478,805
I-C (Enlisted or commissioned)	2,441,468
I-O Not examined	7,232
I-O Examined and qualified	5,465
I-O Married, 19 to 26 years of age	870
I-W (At work)	6,489
I-W (Released)	9,382

I-D Members of a reserve component	942,165
I-S Statutory (College)	17,187
I-S Statutory (High School)	438,742
II-A Occupational deferment (except agricultural)	401,249
II-A Apprentice	49,361
II-C Agricultural deferment	22,526
II-S Student deferment	1,806,792
III-A Dependency deferment	4,131,318
IV-A Completed service; Sole surviving son	2,964,998
IV-B Officials	84
IV-C Aliens	18,260
IV-D Ministers, divinity students	107,575
IV-F Not qualified	2,327,699
V-A Over age liability	16,648,608

Source: Selective Service Newsletter, March (1969)

Comparison of Total Armed Forces Active Duty Personnel to Number of Inductees on Active Duty

	Total Active Duty Personnel	Draftees
June 1960	2,476,000	175,000
June 1961	2,438,000	126,000
June 1962	2,807,000	189,000
June 1963	2,699,000	198,000
June 1964	2,687,000	205,000
June 1965	2,655,000	233,000
June 1966	3,094,000	414,000
Jan. 1967	3,367,000	567,000

Source: *Selected Manpower Statistics,* Directorate for Statistical Services, Office of the Secretary of Defense, pages 19-20, 47-48. Figures to nearest thousand.

Enlistments and Inductions

Fiscal Year	Enlistments	Inductions
1962	127,063	157,654
1963	114,746	74,438
1964	116,202	150,723
1965	101,901	102,555
1966	170,113	317,509
1967	453,601	298,559
1968	487,622	341,404
1969 (First 10 months)		108,400

Sources:

Enlistment Figures—*Selected Manpower Statistics,* Directorate for Statistical Services, Office of the Secretary of Defense, page 27.3

Induction Figures—*Selected Manpower Statistics,* Directorate for Statistical Services, Office of the Secretary of Defense, page 27.3

1967 and 1968 Figures from Annual Reports of Director of Selective Service, p. 2, 1967 Report; p. 1, 1968 Report. 1969 Figures from *Manpower Comments,* March, 1969, p. 20.

TEXT OF STATUTES

* * * * *

50 U.S.C. App. §456 (g) and (h):

(g) *Ministers of religion.*—Regular or duly ordained ministers of religion, as defined in this title, and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been preenrolled, shall be exempt from training and service (but not from registration) under this title.

(h) *Deferment for occupations, dependency, fitness; extended liability; criteria.*—(1) Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. A deferment granted to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action. No person who has received a student deferment under the provisions of this paragraph

shall thereafter be granted a deferment under this subsection; nor shall any such person be granted a deferment under subsection, (i) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under regulations governing hardship deferments), or for graduate study, occupation, or employment necessary to the maintenance of the national health, safety, or interest. Any person who is in a deferred status under the provisions of subsection (i) of this section after attaining the nineteenth anniversary of the date of his birth, or who requests and is granted a student deferment under this paragraph, shall, upon the termination of such deferred status or deferment, and if qualified, be liable for induction as a registrant within the prime age group irrespective of his actual age, unless he is otherwise deferred under one of the exceptions specified in the preceding sentence. As used in this subsection, the term "prime age group" means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers.

(2) Except as otherwise provided in this subsection the President is authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces of any or all categories of persons whose employment in industry, agriculture, or other occupations or employment, or whose continued service in an Office (other than an Office described in subsection (f)) under the United States or any State, territory, or possession, or the District of Columbia, or whose activity in graduate study, research, or medical, dental, veterinary, optometric, osteopathic, scientific, pharmaceutical, chiropractic, chiropodial, or other endeavors is found to be necessary to the maintenance of the national health, safety, or interest: *Provided*, That no person within any such category shall be

deferred except upon the basis of his individual status: *Provided further,* That persons who are or may be deferred under the provisions of this section shall remain liable for training and service in the Armed Forces under the provisions of section 4(a) of this Act until the thirty-fifth anniversary of the date of their birth. This proviso shall not be construed to prevent the continued deferment of such persons if otherwise deferrable under any other provisions of this Act. The President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces (1) of any or all categories of persons in a status with respect to persons (other than wives alone, except in cases of extreme hardship) dependent upon them for support which renders their deferment advisable, and (2) of any or all categories of those persons found to be physically, mentally, or morally deficient or defective. For the purpose of determining whether or not the deferment of any person is advisable, because of his status with respect to persons dependent upon him for support, any payments of allowances which are payable by the United States to the dependents of persons serving in the Armed Forces of the United States shall be taken into consideration, but the fact that such payments of allowances are payable shall not be deemed conclusively to remove the grounds for deferment when the dependency is based upon financial considerations and shall not be deemed to remove the ground for deferment when the dependency is based upon other than financial considerations and cannot be eliminated by financial assistance to the dependents. Except as otherwise provided in this subsection, the President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces of any or all categories of persons who have children, or wives and children, with whom they maintain a bona fide family relationship in their homes. No deferment from

such training and service in the Armed Forces shall be made in the case of any individual except upon the basis of the status of such individual. There shall be posted in a conspicuous place at the office of each local board a list setting forth the names and classifications of those persons who have been classified by such local board. The President may, in carrying out the provisions of this title, recommend criteria for the classification of persons subject to induction under this title, and to the extent that such action is determined by the President to be consistent with the national interest, recommend that such criteria be administered uniformly throughout the United States whenever practicable; except that no local board, appeal board, or other agency of appeal of the Selective Service System shall be required to postpone or defer any person by reason of his activity in study, research, or medical, dental, veterinary, optometric, osteopathic, scientific, pharmaceutical, chiropractic, chiropodial, or other endeavors found to be necessary to the maintenance of the national health, safety, or interest solely on the basis of any test, examination, selection system, class standing, or any other means conducted, sponsored, administered, or prepared by any agency or department of the Federal Government, or any private institution, corporation, association, partnership, or individual employed by an agency or department of the Federal Government.

* * * * *

TEXT OF REGULATIONS

32 C.F.R.:

1622.17 *Class I-Y: Registrant Not Eligible for a Lower Class Who Would Be Qualified for Military Service in Time of War or National Emergency.*—In Class I-Y shall be placed any registrant who, under the provisions of section 1623.2 of this chapter, is not eligible for a lower class, and would be classified in Class I-A, Class I-A-O, or Class I-O but for the fact that he is found under applicable physical, mental, and moral standards to be not currently qualified for service in the Armed Forces and who would be qualified for such service in time of war or national emergency declared by the Congress.

CLASS II

1622.20 *General Rules for Classification in Class II.*—(a) On the local board is placed the responsibility, under applicable rules and regulations, of deciding which men should be deferred because of their civilian activities. It is in the national interest and of paramount importance to our national security that civilian activities which are contributing to the national health, safety, or interest should be disrupted as little as possible, consistent with the fundamental purpose of the Military Selective Service Act of 1967.

(b) No deferment from training and service shall be made in the case of any individual except upon the basis of the status of such individual.

(c) The local board may avail itself of the assistance of all Federal, State, or local agencies to obtain information which will help it to determine whether a claim for occupational deferment should be granted.

(d) No local board, appeal board, or other agency of appeal of the Selective Service System shall be required

to postpone or defer any person by reason of his activity in study, research, or medical, dental, veterinary, optometric, osteopathic, scientific, pharmaceutical, chiropractic, chiropodial, or other endeavors found to be necessary to the maintenance of the national health, safety, or interest solely on the basis of any test, examination, selection system, class standing, or any other means conducted, sponsored, administered, or prepared by any agency or department of the Federal Government or any private institution, corporation, association, partnership, or individual employed by an agency or department of the Federal Government.

* * * * *

1622.22 *Class II-A: Registrant Deferred Because of Civilian Occupation (Except Agriculture and Activity in Study).*—(a) In Class II-A shall be placed any registrant whose employment in industry, or other occupation or employment, or whose continued service in an office (other than an office described in section 1622.41) under the United States, or any State, Territory, or possession, or the District of Columbia, or whose activity in research, or medical, scientific, or other endeavors is found to be necessary to the maintenance of the national health, safety, or interest.

(b) In Class II-A shall be placed any registrant who is preparing for critical skills and other essential occupations as identified by the Director of Selective Service upon the advice of the National Security Council.

1622.23 *Necessary Employment Defined.*—(a) Except as otherwise provided in paragraph (b) of this section, a registrant's employment in industry or other occupation, service in office, or activity in research, or medical, scientific, or other endeavors, shall be considered to be necessary to the maintenance of the national health, safety, or interest only when all of the following conditions exist:

(1) The registrant is, or but for a seasonal or temporary interruption would be, engaged in such activity.

(2) The registrant cannot be replaced because of a shortage of persons with his qualifications or skill in such activity.

(3) The removal of the registrant would cause a material loss of effectiveness in such activity.

* * * * *

1622.24 *Class II-C: Registrant Deferred Because of Agricultural Occupation.*—(a) In Class II-C shall be placed any registrant who is employed in the production for market of a substantial quantity of those agricultural commodities which are necessary to the maintenance of the national health, safety, or interest, but only when all of the conditions described in paragraph (a) of section 1622.23 are found to exist.

(b) The production for market of a substantial quantity of agricultural commodities should be measured in terms of the average annual production per farm worker which is marketed from a local average farm of the type under construction. The production of agricultural commodities for consumption by the worker and his family, or traded for subsistence purposes, should not be considered as production for market. Production which is in excess of that required for the subsistence of the farm families on the farm under consideration should be considered as production for market.

(c) The existence of a shortage or a surplus of any agricultural commodity shall not be considered in determining the deferment of any individual on the grounds that his employment in agriculture is necessary to the maintenance of the national health, safety, or interest.

1622.25 *Class II-S: Registrant Deferred Because of Activity in Study.*—(a) In Class II-S shall be placed any registrant who has requested such deferment and who is

satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning, such deferment to continue until such registrant completes the requirement for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever occurs first.

(b) In determining eligibility for deferment in Class II-S, a student's "academic year" shall include the 12-month period following the beginning of his course of study.

(c) A student shall be deemed to be "satisfactorily pursuing a full-time course of instruction" when, during his academic year, he has earned, as a minimum, credits toward his degree which, when added to any credits earned during prior academic years, represent a proportion of the total number required to earn his degree at least equal to the proportion which the number of academic years completed bears to the normal number of years established by the school to obtain such degree. For example, a student pursuing a four-year course should have earned 25% of the credits required for his baccalaureate degree at the end of his first academic year, 50% at the end of his second academic year, and 75% at the end of his third academic year.

(d) It shall be the registrant's duty to provide the local board each year with evidence that he is satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning.

1622.26 *Class II-S: Registrant Deferred Because of Activity in Graduate Study.*—(a) In Class II-S shall be placed any registrant who is satisfactorily pursuing a course of graduate study in medicine, dentistry, veterinary medicine, osteopathy or optometry, or in such other subjects necessary to the maintenance of the national health, safety, or interest as are identified by the Di-

rector of Selective Service upon the advice of the National Security Council.

(b) Any registrant who is entering his second or subsequent year of post-baccalaureate study without interruption on October 1, 1967, may be placed in Class II-S if his school certifies that he is satisfactorily pursuing a full-time course of instruction leading to his degree: but such registrant shall not be deferred for a course of study leading to a master's degree or the equivalent for more than one additional year, or for a course of study leading to a doctoral or professional degree or the equivalent (or combination of master's and doctoral degrees) for more than a total of five years, inclusive of the years already used in such course of study, or for one additional year, whichever is greater. Any registrant enrolled for his first year of post-baccalaureate study in a graduate school or a professional school on October 1, 1967, or accepted for admission involving enrolled status on October 1, 1967, may be placed in Class II-S if he has entered the first class commencing after the date he completed the requirements for admission and shall be deferred for one academic year only, or until he ceases satisfactorily to pursue such course of instruction, whichever is the earlier.

CLASS III

1622.30 *Class III-A; Registrant With a Child or Children; and Registrant Deferred by Reason of Extreme Hardship to Dependents.*—(a) In Class III-A shall be placed any registrant who has a child or children with whom he maintains a bona fide family relationship in their home and who is not a physician, dentist or veterinarian, or who is not in an allied specialist category which may be announced by the Director of Selective Service after being advised by the Secretary of Defense that a special requisition under authority of section 1631.4 of these regulations will be issued by the delivery

of registrants in such category, except that a registrant who is classified in Class II-S after the date of enactment of the Military Selective Service Act of 1967 shall not be eligible for classification in Class III-A under the provisions of this paragraph.

* * * * *

1622.43 *Class IV-D: Minister of Religion or Divinity Student.*—(a) In class IV-D shall be placed any registrant:

(1) Who is a regular minister of religion;

(2) Who is a duly ordained minister of religion;

(3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school; or

(4) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction leading to entrance into a recognized theological or divinity school in which he has been pre-enrolled.

(b) Section 16 of the Military Selective Service Act of 1967, contains in part the following provisions:

"SEC. 16. When used in this act—* * * (g) (1) the term 'duly ordained minister of religion' means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordi-

nances of public worship as embodied in the creed or principles of such church, sect, or organization.

"(2) The term 'regular minister of religion' means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

"(3) The term 'regular or duly ordained minister of religion' does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization."

* * * * *

1631.7 *Action by Local Board Upon Receipt of Notice of Call.*—(a) When a call is placed without designation of age group or groups, each local board, upon receiving a Notice of Call on Local Board (SSS Form 201) from the State Director of Selective Service (1) for a specified number of men to be delivered for induction, or (2) for a specified number of men in a medical, dental, or allied specialist category to be delivered for induction, shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class I-A and Class I-A-O and have been found acceptable for service in the Armed Forces and to whom the local board has mailed a Statement of Acceptability (DD Form 62) at least 21 days

before the date fixed for induction: *Provided,* That a registrant classified in Class I-A or Class I-A-O who is a delinquent may be selected and ordered to report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and has not been mailed a Statement of Acceptability (DD Form 62); *And provided further,* That a registrant classified in Class I-A or Class I-A-O who has volunteered for induction may be selected and ordered to report for induction notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and regardless of whether or not a Statement of Acceptability (DD Form 62) has been mailed to him. Such registrants, including those in a medical, dental, or allied specialist category, shall be selected and ordered to report for induction in the following order:

(1) Delinquents who have attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

(2) Volunteers who have not attained the age of 26 years in the sequence in which they have volunteered for induction.

(3) Nonvolunteers who have attained the age of 19 years and have not attained the age of 26 years and who (A) do not have a wife with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first or (B) have a wife whom they married after the effective date (August 26, 1965) of this amended subparagraph and with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first.

(4) Nonvolunteers who have attained the age of 19 years and have not attained the age of 26 years and who have a wife whom they married on or before the effective date (August 26, 1965) of this

amended subparagraph and with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first.

(5) Nonvolunteers who have attained the age of 26 years in the order of their dates of birth with the youngest being selected first.

(6) Nonvolunteers who have attained the age of 18 years and 6 months and who have not attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

In selecting registrants in the order of their dates of birth, if two or more registrants have the same date of birth they shall, as among themselves, be selected in alphabetical order.

* * * * *

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1229

DANIEL THOMAS FALLON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1969. On April 4, 1969, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Selective Service Act is unconstitutional because Congress has exempted or deferred some categories of persons from compulsory military service.

2. Whether petitioner's sentence to five years' imprisonment for refusal to submit to induction is subject to appellate review.

STATEMENT

After a jury-waived trial in the United States District Court for the Northern District of Illinois petitioner was convicted of refusing to be inducted into the armed forces in violation of 50 U.S.C. App. 462. On January 19, 1968, he was sentenced to five years' imprisonment.

The evidence showed that on May 16, 1967, petitioner was examined and found acceptable for military service. On May 26, abandoning previous requests for deferment, petitioner requested 1A classification (Govt. Ex. B 11). It was stipulated that petitioner was ordered to report for induction on July 21, 1967, and that, upon reporting, he refused induction (R. 34-38).[1]

Petitioner testified that his refusal to submit to induction was wilfully and knowingly done (R. 46); that he was intent on committing an act of civil disobedience (R. 50). He believed the United States was

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[1] The trial transcript herein referred to as "R.", on file with the Clerk of this Court, consists of one volume.

violating treaties by fighting in Viet Nam (R. 53) and, was opposed to maintaining an army, especially a conscripted one (R. 90). He stated that he was an active member of CADRE, an acronym for Chicago Area Draft Resisters (R. 86-87), an organization which sought to hinder registration and to contact all registrants recently classified 1A and to give them advice (Govt. Ex. B 6, p. 7, R. 89). He declined a court proferred opportunity to be inducted (R. 91).

ARGUMENT

1. Petitioner asserts that the Selective Service Act is unconstitutional because it provides exemptions and deferments for various categories of persons, including women, limited service personnel, ministers, superannuated registrants, students, and those granted hardship and occupational deferments (Pet. 11-20). Comparable exceptions in the Draft Act of 1917 were sustained against challenge in the *Selective Draft Law Cases*, 245 U.S. 366. See, *id.* at 374-375, 389-390. That ruling is of course consistent with the general principle that the Constitution does not require that unequals be treated as equals. *Tigner* v. *Texas*, 310 U.S. 141, 147. Due process does not prohibit governmental classification or regulation, but demands only that the regulations shall not be unreasonable, arbitrary or capricious, and that the means selected to attain the desired objective shall have a real and substantial relation to the purpose of the statute. *Nebbia* v. *New York*, 291 U.S. 502; *Williamson* v. *Lee Optical Co.*, 348 US 483, 489; *Morey* v. *Doud*, 354 U.S. 457, 465; cf. *Levy* v. *Louisiana*, 391 U.S.

68. The exclusion of women and the various selective service classifications to which petitioner points as evidence of discrimination, are, on the contrary, evidence of a reasonable effort to provide a military force from those best able to serve without unnecessarily abandoning other important societal interests.

2. There is no occasion to reconsider the Court's ruling in *Blockburger* v. *United States*, 284 U.S. 299, that the extent of punishment, even if severe, is to be determined by the trial court "with whose judgment there is no warrant for interference on our part" (284 U.S. at 305). *United States* v. *Rosenberg*, 195 F.2d 583, 604 (C.A. 2), certiorari denied, 344 U.S. 838; see *Gore* v. *United States*, 357 U.S. 386, 393. It is generally held that a sentence within the limits of the statute is within the discretion of the trial court and cannot be changed by an appellate court. *Sibley* v. *United States*, 344 F.2d 103, 105 (C.A. 5), certiorari denied, 382 U.S. 945; *Stevens* v. *Warden, Maryland Penitentiary*, 382 F.2d 429 (C.A. 4), certiorari denied, 390 U.S. 1031; *Russell* v. *United States*, 288 F.2d 520 (C.A. 9), certiorari denied, 371 U.S. 926.

Exceptional circumstances may, in the opinion of an appellate court, warrant return of a case to the sentencing court to determine if an error was made. *Leach* v. *United States*, 334 F.2d 945 (C.A.D.C.); *United States* v. *Moody*, 371 F.2d 688, 693 (C.A. 6), certiorari denied, 386 U.S. 1003. Such remands, however, do not constitute reviews and reductions of sentence. See *Leach* v. *United States*, 353 F.2d 451 (C.A.D.C.), certiorari denied, 383 U.S. 917.

There was no error in the sentencing process in petitioner's case. There is no requirement that petitioner's sentence be uniform with those who committed similar offenses in the trial district (see Pet. 8). *Pennsylvania* v. *Ashe*, 302 U.S. 51, 53; *Burns* v. *United States*, 287 U.S. 216, 220. There is a fundamental difference between individual attention to a single defendant, as in the present case, and irrational discrimination in punishment between groups of offenders (see Pet. 8). Cf. *Skinner* v. *Oklahoma*, 316 U.S. 535, 541.[2]

Even assuming that petitioner's sentence was more severe than the sentence usually imposed in that district for failure to submit to induction, the record before the trial judge may well have convinced him that petitioner's case was more serious than the average. Petitioner admitted that he was an active participant in CADRE, an organization which had as one of its objectives: "Bringing about a direct open confrontation with the Selective Service System" (Gov. Ex. B-6). Moreover, it is clear on the record that this confrontation was not to be accomplished solely by legal means. Thus, one of the newsletters which CADRE published stated: "CADRE will encourage and support draft-card burning, induction refusal and nonregistration" (Gov. Ex. B-6). In these circumstances it was not inappropriate for the judge to impose on petitioner a sentence that was

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[2] *Skinner* involved irrational discrimination as to sterilization of recedivist offenders; embezzlers were exempt while thieves were not. Cf. also *McLaughlin* v. *Florida*, 379 U.S. 184, dealing with the irrational classification dependent upon race.

more severe than the average sentence in Selective Service cases.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1969.

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